P A C I F I C N U T R I T I O N – C O N S U L T I N G
Daniel Giacomini
15429 Lake St.
Middletown, CA 95461

May 12, 2006

Mark Bradley, Associate Deputy Administrator
National Organic Program
Transportation & Marketing Programs
1400 Independence Ave., SW.
Room 4008-So., Ag Stop 0268
Washington, DC 20250

Subject: Public comment relating to Docket No. TM-06-06-PR:
Revisions to Livestock Standards Based on Court Order and 2005 Amendment to OFPA.

Dear Mr. Bradley,

Thank you for the opportunity to submit public comment regarding this proposed rule change. While the docket clearly states that "with regard to this proposed rule, this proposed rule merely implements language which Congress has enacted and complies with the court's final judgment and order" there are several items which deserve being addressed.

It is my hope that the result of this rule change will match the intent. Hopefully, certifiers and activists will not try to use these changes to go beyond this stated intent. The Program has announced future plans to implement an ANPR in regard to the two-track system for converting dairy replacement animals. This is the process that should be used to resolve issues regarding the use of the 12-month clause for milk and milk products from dairy animals stated in OFPA (OFPA 6509 (e)(2)) and last third of gestation language after a herd has converted to organic production thereby resolving this dilemma.

The Circuit court in the Harvey case ruled that the Secretary was not authorized by OFPA to create a dairy cattle transition process permitting less than a full 12-months of organic feed and management conversion. This ruling invalidated the so-called 80-20 dairy transition exemption in 7 CFR 205.236(a)(2). In so doing the ruling also invalidated the opportunity to utilize feed that is raised from land included in the organic system plan for the farm, which would include feed from land in its third year of transition to certified organic status during the first 9 months of the dairy animal's 80-20 transition period (7 CFR 205.236(a)(2)(i)). The full 12-month transition for dairy animals is now the only game in town.

The 2005 Congressional amendment to OFPA, without reinstating the 80-20 transition, recognized the so-called "4th year penalty" to the 12-month transition, and changed the

law to allow "crops and forage from land included in the organic system plan of a dairy farm that is in the third year of organic management may be consumed by the dairy animals on the farm during the 12-month period immediately prior to the sale of organic milk and milk products" (Amended 205.236(a)(2)), ie. 3rd year home-grown transition crops can be fed during the one-year dairy-herd transition.

The preamble of the proposed rule change discusses this rule change only in relation to pasture. There does not seem to be any restriction in the proposed ruling to limit this feed to pasture. It could be pasture, hay, silage, grain, or straw. Limiting the discussion of this rule change to pasture avoids many potential problems that must be recognized with the other possible feedstuffs. Feeds harvested in the 3rd year of transition of the ground and crops as recognized in the organic system plan for the dairy farm operation could be stored and fed during the 12-month transition of the dairy animals. This feed could be fed up to the day that the dairy animals become certified and begin producing certified organic milk. However, the day the dairy animal becomes certified organic, she can no longer consume these feeds under the rule. The remaining feed would have to be removed from the operation or used in some other way. The preamble clearly states that this feed is not "conventional". However, it cannot be stated that this feed is "organic". Moreover, care must be taken that stored 2nd year transition home-grown crops are not fed during the dairy animals' 12-month conversion period.

7 CFR 205.236(a)(2)(iii), now renumbered 205.236(a)(2)(i) was not addressed by the court in the Harvey case or by the Congressional amendment to OFPA. Therefore, it seems that this proposed rule change does not address the statements in OFPA 6509(a) and 6509(b) requiring the last third of gestation for all livestock that are to be slaughtered and sold as organically produced, and 6509(e)(2) which states that a dairy animal from which milk and milk products will be sold and labeled as organically produced shall be raised and handled organically for not less than 12-months immediately prior to the sale of such milk and milk products. These seemingly different requirements have caused great confusion and debate in the organic dairy farm industry and at NOSB meetings.

This issue is seemingly addressed in the preamble of the proposed rule change. It states that for dairy cows who have been organically fed and managed for 12-months prior to producing milk and milk products ONLY the milk and milk products they produce are organic. The cow herself is not organic unless she was raised organically from the last third of gestation prior to her birth. Unless the cow is raised organic from the last third of gestation she cannot be represented as organic at slaughter. However, the amended 7 CFR 205.236(a)(2)(i) does not seem to allow for dairy animals that are not allowed for organic slaughter to be allowed to produce organic milk and milk products outside of the herdmates initially transitioned to organic as a whole herd.

If the intent of this proposed rule change is solely to implement what is required by the final judgment in the Harvey lawsuit and the 2005 Congressional amendment to OFPA and maintain the two-track system for converting dairy replacement animals for the time being until an ANPR can be completed, then the proposed 7 CFR 205.236(a)(2)(i) should be eliminated. For this to be accepted by the industry, it would have to be clearly stated

that this change intends to continue all existing policy outside of what was required to be changed with a restatement of a full intent to enact an ANPR on this matter in the near future. It would need to be stated that this was not new rulemaking contrary to those in the certified organic industry who desire last-third of gestation rules for dairy operations once they have become certified, but rather full implementation of the order of the court while still fully recognizing that the two-track problem still must be resolved.

Both of these actions are very problematic. I am not sure which one would be clearer and create fewer problems after being enacted. At the very least, full consideration for the resulting consequences of the final language is needed. Discussion of these consequences in the preamble of the document could be helpful for acceptance by the organic dairy industry.

The paragraph in the preamble mentioned above concludes with the sentence: "That remains the same as in the NOP regulation." It is not clear and it is not stated how the amended 7 CFR 205.236(a)(2)(i) supports, contradicts or is consistent with OFPA 6509(e)(2).

Unfortunately, Program documents have not always helped to clarify the situation. Prior to 7 CFR 205.236(a)(2)(iii) being renumbered, it was generally accepted that it related to the portion of 7 CFR 205.236(a)(2) following the "Except", as described in the NOP flowchart document Origin of Livestock dated April 11, 2003. This interpretation seems to be somewhat contradicted in the answer to the first question listed in the NOP document Q and A's for Harvey Proposed Rule dated April 25, 2006. It is again addressed in the NOP document NOP Statement Regarding Extended Comment Period on TM-06-06-PR Harvey v. Johanns Proposed Rulemaking (undated but recently released) in the last question listed. Hopefully, all parties involved, from all points of view, will allow a full ANPR process to proceed to discuss and resolve this matter to better clarity without harm coming to the perception of the organic dairy farm industry in the eye of the organic milk-consuming public.

7 CFR 205.236(a)(2) restates OFPA 6509(e)(2). The revised 7 CFR 205.236(a)(2)(i) is additional to OFPA in regards to requirement for dairy animals to produce organic milk and milk products. However, depending on your point of reference it could be viewed as either a necessary additional requirement and in-line with OFPA 6509(a-b), or as contradictory to OFPA 6509(e)(2).

The Court order in the Harvey case dealt with actions by the Secretary that were viewed to be exceptions to the requirement defined in OFPA. Actions by the Secretary that would be in addition to the requirement defined in OFPA were not addressed. Therefore, the question can be asked "do we have an example within NOP rules where the Secretary has exceeded the requirement in OFPA, essentially without legal challenge?" I believe the answer is "yes".

A requirement for "access to pasture" is not mentioned in OFPA. However, the final rule clearly states a requirement of "access to pasture" (7CFR 205.239(a)(2) with allowance

for temporary confinement in 7CFR 205.239(b)(1-4)) and further NOSB and NOP action continues to try to clarify and define wording of that and other related sections to support certifying agencies to better enforce that portion of the rule. "Access to pasture" is clearly a requirement in excess of requirements stated in OFPA and I am not aware of the NOP being legally challenged on that or any similar matter.

The fact that an additional requirement to OFPA does not seem to be without precedent does not answer the question as to whether the additional wording is supporting or contradictory to OFPA language in this case. To the nonlegalistic mind, the answer to that question very much depends on your point of view. A closed organic dairy herd would prefer that the organic dairy industry was closed from the conventional market except for whole-herd transitions, and they would see the rule as supporting to OFPA. Herds managed with more open philosophies, and without the same land and facility constraints, and looking to expand at a rate greater than their natural ability to increase cow numbers with their own crop of young stock would desire the opportunity to purchase conventional replacements and transition them under organic feed and management for 12 months prior to them producing organic milk and milk products would view the rule as contradictory and excessive. Certified heifer ranches, and organic dairy herds with the desire of raising and selling additional young stock, would like to be able to purchase conventional replacements, transition them for 12 months to certified organic status and be able to sell those animals to the organic dairy farm market. A closed organic dairy herd with additional replacements to sell off the farm would be rightfully upset by such action as it would decrease the market value of their product, and would not even believe in the concept of certified organic heifer ranches in the first place.

The other view of precedent in this case could be that the example of "access to pasture" is not relevant. "Access to pasture" is not specifically mentioned in OFPA but it could be considered as an additional standard relating to the health of the animal as specified in OFPA 6509(d)(2). However, the 12-month conversion versus last-third of gestation argument would not be considered a health care issue as described in that section. Moreover, a regulation regarding conversion of dairy animals is specifically spelled out in OFPA (OFPA 6509(e)(2)). Granted, OFPA 6506(a)(11) which allows for terms and conditions of the overall general organic program as may be determined by the Secretary to be necessary, may be the applicable section in this case.

While there is no doubt that the consumer desires no prohibited materials in their milk supply, it is not evident from most surveys if they perceive management practices done to the young dairy animal, over 12 months prior to the production of organic milk and milk products, as problematic or not, especially when the option is presented in light of relieving pain and suffering of the baby calf and forcing the organic dairy farmer to remove the treated calf from their certified organic operation.

The proposed rule change does agree in substance with NOSB Origin of Livestock Recommendation for Rule Change, adopted May 14, 2003. While this recommendation blamed the course of 7 CFR 205.236(a)(2)(iii) on a problem of inaccurate numbering, the intent was to "assure that one standard applies to all dairy operations, once they have

converted to organic production" and the specifics of that recommendation lean toward a preference of last-third of gestation language. This proposed rule change does seem to point in that direction.

While it is stated in the preamble that "USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule", it seems very clear that there continues to be some confusing aspects to the relationship between 7CFR 205.236 and OFPA 6509 in regards to the raising of young stock after the dairy herd has converted to certified organic production. Hopefully, at some time this confusion will be addressed specifically. It is understandable that it will not be fully addressed in this rule change.

One aspect of the court's judgment in the Harvey case was that it disagreed with USDA's contention that since OFPA did not address herd conversions that the herd could have different requirements than what was stipulated in OFPA for individual animal conversions. The court felt that the conversion of one animal or a herd of 100 animals was essentially the same. It seems that the language in amended 7 CFR 205.236(a)(2)(i) continues with this problem. What is an "entire, distinct herd" and where is it defined? If someone buys small groups of certified organic animals from a number of certified organic herds and builds a new herd, when does that herd become an entire, distinct herd that has been converted to organic production, or does it ever? More appropriate language could be "(i) Once a production operation has been certified to produce and sell certified organic milk and milk products, all dairy animals shall be under organic management from the last third of gestation." How either wording would impact on the above herd's ability to purchase additional dairy animals remains confusing and does not contradict the previous discussion regarding whether keeping or deleting this section is preferred. This comment relates to the situation where keeping this subparagraph has been decided and tries to correct potential problems with the current proposed language in that case.

7CFR 205.606 is being amended to be much clearer and encompassing. The wording which appeared to allow for nonorganic agricultural products to be used in accordance with this section without going through the petition process seems to have been removed. All items related to this section now have to be petitioned, included on the list and then verified by the certifier prior to use.

However, the new wording of this section seems to include "made with organic…" products in the petition process. The basis of the "made with organic" designation is that nonorganic agricultural items can be included in these products up to a certain percentage of the final product. While this is not an area of the rule that I have an extended amount of experience with, it seems by definition that the products sold under this designation would not require approval for the nonorganic agricultural items that they contain.

Including "made with organic" products in the petition requirement within the amended 7 CFR 205.606 regulation appears to be problematic and cumbersome. This requirement would be costly in time and money in regards to the petitioning process for the filing of the petition, to the NOSB and NOP to review and implement each change proposed, and

to certifiers needing to verify the lack of commercial availability of the organic agricultural counterpart.

Personally, I find the concept of nonorganic agricultural products being allowed in human organic food products confusing and contrary to what appears to be the desire of the consumer to consume healthy organic food in the absence of pesticides, herbicides and commercial fertilizers. I find the inclusion of these items even at the level of less than 5% as a major deviation from that desire and the overall intent of the organic philosophy.

Thank you for the opportunity to respond to this proposed rule change. Thank you to the NOP for respectful consideration on all comments submitted.

Respectfully,

Daniel Giacomini